**COMMONWEALTH OF KENTUCKY**
**SUPREME COURT OF KENTUCKY**
**2013-SC-000483-MR**

GREGORY WILSON — APPELLANT

v.

Appeal from Kenton Circuit Court
Action No. 87-CR-00166
Hon. Gregory M. Bartlett, Judge

COMMONWEALTH OF KENTUCKY — APPELLEE

# REPLY BRIEF FOR APPELLANT, GREGORY WILSON

Submitted by:

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## Certificate of Service

This is to certify that a copy of this brief was mailed, first-class postage prepaid, to Hon. Gregory M. Bartlett, Judge, Kenton Circuit Court, First Division, Kenton County Judicial Center, 230 Madison Avenue, Covington, KY 41011, Hon. Robert Sanders, Commonwealth's Attorney, 303 Court Street, Suite 605, Covington, KY 41011, and to the office of Hon. Heather M. Fryman, Assistant Attorney General, Office of the Attorney General, Office of Criminal Appeals, 1024 Capital Center Drive, Frankfort, KY 40601, on June 12, 2014. I further certify that the record on appeal was not removed from the office of the Clerk of the Supreme Court of Kentucky.

BRUCE P. HACKETT

## PURPOSE OF THE BRIEF

This Reply Brief is filed in order to address the arguments made by the Commonwealth in the Brief filed in this Court. In particular, Appellant will address the Commonwealth's allegation that Appellant has made "misstatements concerning the applicability of the *Hollon* decision" and that Appellant "failed to inform this Court" about the evidentiary hearing held in United States District Court. (Brief for Commonwealth, pp. i, 6).

## STATEMENT CONCERNING ORAL ARGUMENT

The Commonwealth does not want to present oral argument to this Court. The explanation for this decision is twofold. First, the Commonwealth says: "[t]he Appellant's claims were heard, reviewed and rejected in federal court." The second reason given for rejecting oral argument is: "Appellant's misstatements concerning the applicability of the *Hollon* decision." (Brief for Commonwealth, p. i). As Appellant will demonstrate in the Argument section of this Reply Brief, when an advocate presents an argument about the meaning or application of a Court decision, that advocate is misstating nothing. Rather, that advocate is merely doing what lawyers do – presenting an argument on behalf of a client by stating a legal position that the advocate urges the Court to adopt. That the opposing party may have a different interpretation of a court decision does not make either party's argument a "misstatement." The Commonwealth ascribes to the personal attack theory of practicing law: when the law is not on your side, argue the facts; when neither the law nor the facts are on your side, attack opposing counsel. If for no other reason, this Court should schedule oral argument so that the Commonwealth may present its best arguments in support of its unfounded allegations.

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## INTRODUCTION

In addition to accusing counsel for the Appellant of making misstatements about the relevant court decisions, the Commonwealth's approach in this appeal, indeed the theme of its Brief, is to not so subtly suggest that counsel misleads the Court by hiding certain facts from the Court. For example, on page 5 of its Brief, the Commonwealth says:

> **Contrary to the Appellant's assertion that he has never had the chance to litigate his current arguments**, the Appellant was, in fact, granted an evidentiary hearing in federal court to develop his claim of ineffective assistance of appellate counsel ("IAAC"). [Emphasis added]

The Commonwealth then follows up this statement on page 6 of its Brief by stating:

> However, notably, the **Appellant has failed to inform this Court** that the purpose of that hearing was to litigate the exact claims that he now raises – and that the claims were rejected by the federal court. [Emphasis added]

So, on pages 5 and 6 of its Brief, the Commonwealth has communicated two ideas to this Court. First, the Commonwealth says that the Appellant has told this Court that he never had the chance to litigate IAAC claim in federal court. Second, the Commonwealth says that the Appellant withheld from this Court the fact that there was a hearing in federal court on the IAAC claim. Notably, the Commonwealth does not cite to the pages in the Appellant's Brief where Appellant made the alleged misrepresentations that the Commonwealth has attributed to the Appellant. There is good reason for the lack of citation to Appellant's Brief – the Commonwealth's assertions are simply not true.

Here is what Appellant actually said in his initial Brief filed in this Court:

> In federal court, Mr. Wilson had been granted an evidentiary hearing on his claim that he had been denied effective counsel on direct appeal (IAAC).

(Brief for Appellant, p. 3) (Footnote omitted). On the next three pages of his Brief, Appellant discussed the testimony of the witnesses at the hearing, the ruling by the United States District Court and the decision of the Sixth Circuit. (Brief for Appellant, pp. 4-6). Thereafter, in a section titled "Deferential and fundamentally flawed federal review," Appellant discussed in detail the District Court and Court of Appeals decisions. (Brief for Appellant, pp. 12-17). The arguments made in the Commonwealth's Brief are based upon the Commonwealth's false claims about what Mr. Wilson did or did not tell this Court in his Brief. For that reason alone, this Court would be wholly justified in rejecting the Commonwealth's arguments.

After cavalierly tossing in its baseless aspersions at the beginning of its Brief, the Commonwealth waits until page 11 of its Brief to come clean and tell the truth about what the Appellant actually told the Court in his initial Brief. The Commonwealth begins its second argument by stating:

> The **Appellant agrees that his claims were heard in the federal courts** upon review of his petition for *habeas corpus*. [Emphasis added]

(Brief for Commonwealth, p. 11). The truth is that the Appellant never tried to hide from this Court or the Kenton Circuit Court that he had a hearing on his IAAC claim in federal court. In fact, Appellant attached the transcript of the federal court hearing to the Appendix that he filed in Kenton Circuit Court along with his RCr 11.42 motion. (TR I, 59; Box 8 of 8).

On pages 9-10 of its Brief, the Commonwealth continues with its theme, accusing the Appellant of making assertions about *Hollon v. Commonwealth*, 334 S.W.3d 431 (Ky. 2011), that are "replete with inaccuracies" and stating that the Appellant "misstates and

misconstrues RCr 11.42(10)." The fact is that Appellant made arguments concerning the meaning and application of *Hollon* and RCr 11.42 to the unique facts in Mr. Wilson's case, demonstrating why the retroactivity portion of *Hollon* should not apply.

In the section that follows, Appellant will address specific points made by the Commonwealth in its Brief.

## ARGUMENT

**The circuit court erred when it denied, without a hearing, Gregory Wilson's motion to vacate his conviction on the basis of ineffective assistance of appellate counsel on direct appeal from his criminal conviction. Mr. Wilson received ineffective assistance of counsel from Hon. Gail Robinson, appellate attorney-in-fact, as well as Hon. William Summers, Hon. David Bruck, Hon. Mario Gerald Conte, Jr. and Hon. Robert W. Carran, appellate attorneys of record, because they raised ineffective assistance of counsel on direct appeal. This precluded the presentation of facts outside of the direct appeal record that were essential to show that Mr. Wilson received ineffective assistance of trial counsel from Hon. Kevin McNally, Ms. Robinson's husband, Hon. William Hagedorn and Hon. John Foote.**

On page 11 of its Brief, the Commonwealth cites *Yeoman v. Commonwealth, Health Policy Board*, 983 S.W.2d 459 (Ky. 1998) and *Allen v. McCurry*, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980), for the proposition that Mr. Wilson's ineffective assistance of appellate counsel claim is "barred by *res judicata* because it is a repetitious action involving the same claim." Neither of those decisions address the situation presented in Mr. Wilson's case where the claim for relief was not recognized by a state court until after a federal habeas corpus action. The Commonwealth's argument fails to take into account several factors.

First, the federal court review was necessarily performed through the deferential and constricted review process mandated by the Antiterrorism and Effective Death

Penalty Act of 1996 ("AEDPA"), Publ. L. No. 104-132, § 104(d), 110 Stat. 1214, 1219. *See Cullen v. Pinholster*, 131 S.Ct. 1388, 1403 (2011), citing *Knowles v. Mirzayance*, 556 U.S. 111, 112 (2009). *See also Burt v. Titlow*, 134 S.Ct. 10, 13 (2013). Furthermore, as explained in Appellant's initial Brief, the federal court adjudication was fundamentally flawed. (Brief for Appellant, pp. 12-17). Finally, the federal court did not address (and *could* not address) the state constitutional and statutory bases for the claim for relief.

On page 14 of its Brief, the Commonwealth presents the argument that this Court reviews "trial attorney performance" on direct appeal in capital cases. For this proposition, the Commonwealth cites *Sanders v. Commonwealth*, 801 S.W.2d 665, 668 (Ky. 1991), *Perdue v. Commonwealth*, 916 S.W.2d 148, 154 (Ky. 1996), *Tamme v. Commonwealth*, 973 S.W.2d 13, 21 (Ky. 1998), *Mills v. Commonwealth*, 996 S.W.2d 473, 479 (Ky. 1999) and *Soto v. Commonwealth*, 139 S.W.3d 827, 848 (Ky. 2004). It is true that where the death penalty has been imposed, this Court reviews unpreserved error differently than it normally does in a non-capital direct appeal. But the claim that on direct appeal in a death penalty case this Court actually reviews trial attorney performance in the *Strickland*[1] constitutional sense is simply wrong.

When this Court is presented with unpreserved error in a capital case, the Court looks to see if there is any reason on the face of the record that demonstrates that the action or inaction of trial counsel can be attributed to a legitimate defense tactic. If there is none, the error gets palpable error review. The Court does not, on direct appeal, review counsel performance under the *Strickland* test, that is, the Court does not make a determination whether counsel's performance is objectively unreasonable and, if so,

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[1] *Strickland v. Washington*, 466 U.S. 668 (1984).

whether the deficient performance resulted in prejudice to the defendant.

> Assuming that the so-called error occurred, we begin by inquiring: (1) whether there is a reasonable justification or explanation for defense counsel's failure to object, e.g., whether the failure might have been a legitimate trial tactic; and (2) if there is no reasonable explanation, whether the unpreserved error was prejudicial, i.e., whether the circumstances in totality are persuasive that, minus the error, the defendant may not have been found guilty of a capital crime, or the death penalty may not have been imposed. *Johnson v. Commonwealth,* 103 S.W.3d 687, 691 (Ky.2003) (citing *Sanders v. Commonwealth,* 801 S.W.2d 665, 668 (Ky.1990)).

*Hunt v. Commonwealth*, 304 S.W.3d 15, 28 (Ky. 2009). This Court's specialized review of unpreserved error in capital cases does not equate to an application of the constitutionally required *Strickland* test for ineffective assistance of trial counsel.

In *Cosby v. Commonwealth*, 776 S.W.2d 367, 369 (Ky. 1989) *overruled by St. Clair v. Roark*, 10 S.W.3d 482 (Ky. 1999), this Court explained the review process for unpreserved error in capital cases is based, not upon *Strickland*, but upon KRS 532.075:

> The Commonwealth urges this Court to reconsider the position stated in *Ice v. Commonwealth,* 667 S.W.2d 671, 674 (Ky. 1984), holding "that in a death penalty case every prejudicial error must be considered, whether or not an objection was made in the trial court." *See also Stanford v. Commonwealth,* 734 S.W.2d 781, 783 (Ky. 1987), to the same effect. This position is generated by KRS 532.075, the statute specifying the duties of our Court in reviewing death penalty cases, which states in pertinent part that "[t]he Supreme Court shall consider ... any errors enumerated by way of appeal."
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> The idea of imposing a higher standard of review in cases where the death penalty has been imposed did not originate with our Court, nor indeed with our Kentucky General Assembly. Its genesis is the opinions of the United States Supreme Court which has stated in many cases that "death is a different kind of punishment from any other" invalidating procedural rules that tend to "diminish the

> reliability of the sentencing determination," and "of the guilt determination" as well. *Beck v. Alabama,* 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392, 403 (1980). Because of the "qualitative difference" from a crime punished by a term of years, "there is a corresponding difference in the need for reliability...." *Woodson v. North Carolina,* 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976). Our statute and our standard of review are but a codification of the United States Supreme Court mandate.

*Cosby v. Commonwealth*, 776 S.W.2d at 369. The review of unpreserved error in capital cases has nothing to do with *Strickland.* If it did, this Court would have said so in *Cosby* when it explained that the "statute [ ] and our standard of review are but a codification of the United States Supreme Court mandate" of *Beck v. Alabama* and *Woodson v. North Carolina.*

This Court explained the difference and significance between the palpable error standard of review for unpreserved error and the *Strickland* standard of review for IAC in the case of *Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). The Court first discussed the long-standing rule in Kentucky that post-conviction proceedings could not be used to litigate issues that were raised or that should have been raised on direct appeal. "[I]it is clear that some issues must be brought to the attention of the appellate courts in the direct appeal, while others must be presented first to the trial court by way of a collateral attack. There is little if any overlap between the two classes of claims." *Leonard v. Commonwealth*, 279 S.W.3d at 156. The Court further explained, "This rule has been applied consistently to bar two classes of claims from being brought in collateral attacks: (1) those that could and should have been litigated in the direct appeal; and (2) those that were actually litigated in the direct appeal." *Id.* The Court then addressed the

significant differences between the palpable error standard of review for unpreserved error and the *Strickland* standard of review for IAC:

> Implicit in *Martin*[*v. Commonwealth*, 207 S.W.3d 1 (Ky.2006),] is the notion that in most instances **a direct appeal allegation of palpable error is fundamentally a different claim than a collateral attack allegation of ineffective assistance of counsel based on the alleged palpable error.** This makes sense because the issue "raised and rejected" on direct appeal is almost always not a claim of ineffective assistance of counsel. Instead, the palpable-error claim is a direct error, usually alleged to have been committed by the trial court (e.g., by admitting improper evidence). The ineffective-assistance claim is collateral to the direct error, as it is alleged against the trial attorney (e.g., for failing to object to the improper evidence). Such a claim is one step removed from those that are properly raised, even as palpable error, on direct appeal. While such an ineffective-assistance claim is certainly related to the direct error, it simply is not the same claim. And because it is not the same claim, **the appellate resolution of an alleged direct error cannot serve as a procedural bar to a related claim of ineffective assistance of counsel.** [Emphasis added].

*Leonard v. Commonwealth*, 279 S.W.3d at 158. In discussing the post-conviction case of *Martin v. Commonwealth*, 207 S.W.3d 1 (Ky. 2006), in which the Court had rejected the rule that a palpable error issue raised on direct appeal could not be later raised in post-conviction as an IAC claim, the Court said:

> This Court reversed the Court of Appeals, holding that Martin could present his ineffective assistance of counsel claims in the RCr 11.42 context even though the underlying claim of error had been denied on direct appeal. In so holding, **this Court noted that the standards for evaluating potential palpable errors on direct appeal and claims of ineffective assistance of counsel were substantially different, with the palpable error standard being more stringent.** [Emphasis added].

*Leonard v. Commonwealth*, 279 S.W.3d at 157.

In Kentucky, the proper vehicle by which a claim of ineffective assistance of trial counsel is to be brought is in a post-conviction action, not on direct appeal. "The issue of insufficient assistance of counsel must be raised at the trial level by means of a post trial motion. *Wilson v. Commonwealth*, 601 S.W.2d 280 (Ky. 1980)." *Hopewell v. Commonwealth*, 641 S.W.2d 744, 748 (Ky. 1982). "This court has consistently held that the issue of ineffective assistance of counsel must be raised at the trial level by means of a post-trial motion for it to be considered on appeal. [Citation omitted]." *Wilson v. Commonwealth*, 601 S.W.2d at 284. The litigation of the issue in post-conviction allows for the proper development of a factual record beyond the trial record to support or refute the IAC claim. Due to the deficient performance of his direct appeal attorneys, Mr. Wilson was precluded from a proper merits review of the performance of his trial attorneys, described as "one of the worst examples . . . of the unfairness and abysmal lawyering that pervade capital trials." *Wilson v. Rees*, 624 F.3d 737, 741 (6th Cir. 2010) (Martin, J., disssenting from the denial of rehearing *en banc*).

On pages 15-16 of its Brief, the Commonwealth argues that the doctrine of laches should preclude the litigation of the ineffective assistance of appellate counsel and ineffective assistance of trial counsel claims. But, as pointed out in *Denison v. McCann*, 303 Ky. 195, 197 S.W.2d 248 (1946) (the case that the Commonwealth quotes on pages 15-16), "The doctrine of laches is, in part, based upon the injustice that might or will result from the enforcement of a neglected right. [citation ommited]." In Mr. Wilson's case, it is he, not the Commonwealth, that suffers from the injustice of being precluded from enforcing his right to effective counsel because the proper development and litigation of that right was neglected by direct appeal counsel. Furthermore, in order to

invoke the doctrine of laches, the Commonwealth must demonstrate prejudice, that is, show that it will suffer great harm or disadvantage if the claim is addressed on the merits. *See Denison v. McCann*, 197 S.W.2d at 249. The Commonwealth has failed to identify any harm or disadvantage, let alone great harm or disadvantage, that it will suffer as a result of the litigation of Mr. Wilson's claim of ineffective assistance of appellate and trial counsel.

## CONCLUSION

For the foregoing reasons, the appellant, Gregory Wilson, respectfully requests that this Court reverse and remand the June 18, 2013, order of the Kenton Circuit Court.

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